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In The  
**Supreme Court of the United States**  
October Term, 1993

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JOHN H. DALTON, Secretary of the Navy, et al.,  
*Petitioners,*

v.

ARLEN SPECTER, et al.,

*Respondents.*

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On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF FOR BUSINESS EXECUTIVES FOR  
NATIONAL SECURITY AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE BRIEF OF  
BUSINESS EXECUTIVES FOR NATIONAL  
SECURITY AS AMICUS CURIAE**

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Pursuant to Rule 37.4 of the rules of this Court, Business Executives for National Security ("BENS") respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondents' counsel to provide consent.

BENS is a non-partisan, non-ideological, and non-profit organization of top business leaders from around

the country.<sup>1</sup> BENS' members share a commitment to promote a sound, cost-effective national security policy and to encourage the Defense Department and other agencies to adopt successful business practices in defense planning and management. This common interest has led BENS to become involved in a wide range of defense and security policy debates, including base closure and conversion, force restructure, procurement, management, industrial base, and nonproliferation issues. Founded in 1982, BENS is funded by the individual contributions of members and private foundations. BENS has no corporate members and does not accept government funds.

BENS' primary purpose is to educate citizens and policy makers about how to achieve a more efficient national security structure by employing successful business planning and management techniques. BENS accomplishes its mission by issuing policy papers,<sup>2</sup> serving as a resource for policy makers and the media, and conducting workshops and other meetings throughout the United States. BENS also acts as a resource for the executive and legislative branches by providing briefings, legislative analysis, and testimony to lawmakers.<sup>3</sup>

<sup>1</sup> A partial list of members is included at pages 1-10 of the Appendix to the accompanying Brief for *Amicus Curiae*.

<sup>2</sup> BENS publishes three basic policy products: "Special Reports" (thorough in-depth studies of particular issues); "Issue Briefs" (policy papers that make specific recommendations to the Congress or the President); and "Policy Updates" (short papers designed to convey recent information on specific issues).

<sup>3</sup> BENS has testified several times before the Congress on base closure, defense conversion, and other national security issues. See note 6 *infra*.

Recognizing that the government must retain a practical, non-political process for closing unnecessary military bases, BENS has long supported the use of an independent, non-partisan commission to identify, and recommend the closure of, unnecessary military bases. William H. Tremayne, a member of the BENS Board of Directors and the project manager for the Grace Commission,<sup>4</sup> helped pave the way for a base closing commission when, in 1983, he recommended that "[t]he President should appoint an independent commission to make a comprehensive study of the base realignment problem."<sup>5</sup> Since then, BENS has worked with both the government and the private sector to create an achievable, fair, and objective system for closing bases,<sup>6</sup> as embodied in the

<sup>4</sup> The Office of the Secretary of Defense Task Force of the President's Private Sector Survey on Cost Control in the Federal Government is commonly and hereinafter referred to as the "Grace Commission."

<sup>5</sup> Grace Commission, *Report on The Office of the Secretary of Defense* 103 (1983).

<sup>6</sup> Two BENS members, Arthur Levitt, Jr. and Howard H. Callaway, were 1991 Base Closure and Realignment Commissioners. In addition, BENS has provided testimony on base closure to Congress. See, e.g., Military Construction (H.R. 5022) *Hearings on National Defense Authorization Act for Fiscal Year 1993 - H.R. 5006 and Oversight of Previously Authorized Programs Before the Subcomm. on Military Installations and Facilities of the House Comm. on Armed Service*, 102d Cong., 2d Sess. 528 (1992) (Statement of Robert W. Gaskin, Director of Policy, BENS); Keith Cunningham, Testimony Before the Legislation and National Security Subcommittee of the House Committee on Government Operations (July 14, 1993); Keith Cunningham, Testimony Before the Military Readiness Subcommittee of the Senate Committee on Armed Services (May 20, 1993).



Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2901 *et seq.*, 104 Stat. 4739 *et seq.* (1990) (codified at 10 U.S.C. § 2687) (the "1990 Act").

In 1992 BENS began a major study of how the base closure process has actually been working in order to better understand the effect of base closure on affected communities. The initial results of this unique, on-going study were published in April 1993. Keith Cunningham, Business Executives for National Security, *Base Closure and Reuse: 24 Case Studies* (1993) ("BENS Study"). The BENS Study's findings have already been cited many times in the media and used extensively by the current Administration and the Congress to develop community assistance policies.

BENS seeks leave to file a brief *amicus curiae* in this case because, in light of its unique position as the only truly independent organization that has studied the effects of base closures on local communities, it can provide this Court with a useful perspective on how the base closure process as designed by Congress has actually worked. By describing the "real-world" operation of the 1990 Act, BENS' participation as an *amicus curiae* can illuminate for the Court how strikingly this experience has confirmed the judgment of the drafters of the 1990 Act – manifest in its text and legislative history – that the unavoidable closure of unneeded military bases must operate with speed and finality to transform base closure from a disaster for local communities into an economic boon of no mean proportions. Research shows that communities can and do successfully convert military facilities to productive new uses, provided that the complex and interrelated array of public and private decisions

needed to plan, finance and execute a successful conversion is not subject to the uncertainty and delays that necessarily accompany litigation. Because litigation would impede redevelopment efforts and thus harm communities, Congress intended – *sensibly* intended, as the facts have shown – to preclude judicial review of the base closure process.

Accordingly, BENS respectfully requests that its motion for leave to file an *amicus curiae* brief in support of petitioners be granted.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of the *amicus* is set forth in the motion  
 accompanying this brief.

SUMMARY OF ARGUMENT

The Defense Base Closure and Realignment Act of  
 1990, Pub. L. No. 101-510, § 2901 *et seq.*, 104 Stat. 4739 *et*  
*seq.* (1990) (codified at 10 U.S.C. § 2687) (the "1990 Act")

established an expedited process for closing obsolete military bases largely in order to maximize the potential of affected communities to generate new jobs and income by redeveloping closed bases. Congress recognized that for such efforts to be successful, communities would have to know with certainty that bases selected for closure would actually be closed without undue delay. The actual experience of affected communities has confirmed the wisdom of Congress' judgment, and shows that communities can successfully convert closed bases from military to civilian uses if the major stages of base redevelopment, such as planning, leasing, marketing, and financing, are effectively integrated with the base closure process. That integration can only occur if base closure operates with finality and with some predictability. Because litigation would be at odds with this goal by interjecting delays and uncertainty into the redevelopment process, Congress relied on procedures other than judicial review to ensure the fairness and reasonableness of decisions to close particular bases.

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## ARGUMENT

### I. CONGRESS INTENDED TO ESTABLISH A BASE CLOSURE PROCESS THAT WOULD MINIMIZE POTENTIAL HARM TO COMMUNITIES BY IMPLEMENTING BASE CLOSURE DECISIONS WITH SPEED AND FINALITY.

The base closure process created by the 1990 Act has at its heart the goal of minimizing the harm that communities could suffer from the closure of neighboring military bases.

Indeed, it was the fear of such harm that created the political gridlock which had long prevented Congress from closing any military bases. As Representative Dick Armey, the architect of the Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, § 101 *et seq.*, 102 Stat. 2623 *et seq.* (1988) (codified at 10 U.S.C. § 2687) ("1988 Act"), which first codified the base closure commission concept upon which the 1990 Act is based, stated on the House floor, "[m]ilitary bases provide jobs to many civilians and the paychecks of their personnel help support local economies. This means that if a base becomes redundant or obsolete, a Member will fight to keep it open as if his political life depends on it." 134 Cong. Rec. H1615 (daily ed. April 13, 1988).<sup>1</sup> It is no exaggeration, therefore, to state that individual legislators felt that their political survival as well as the public interest depended upon their skill in crafting a base closure process that took into account the needs of affected communities.<sup>2</sup>

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<sup>1</sup> Senator William Roth, in discussing what would become the 1988 Act, acknowledged that "[t]he formulators of this initiative are fully aware that some local communities can be negatively impacted by the closure of military facilities." 134 Cong. Rec. S4973 (daily ed. April 27, 1988). Indeed, so great had been this concern in the past that Congress enacted certain provisions in the 1970s "for the express purpose of preventing bases from being closed. . . . [T]hat has been so effective that it has prevented all base closures in the last 10 years." 134 Cong. Rec. H1621 (daily ed. April 13, 1988) (statement of Rep. Armey).

<sup>2</sup> During the debate on the 1988 Act, Senator John Warner openly acknowledged this sentiment on the Senate floor: "The chairman [of the Senate Armed Services Committee, Senator Sam Nunn] mentioned the apprehension of the Members of Congress, and indeed as we approach our responsibility to vote on this momentarily, I am fearful that some will say 'We are



Without doubt, in crafting the 1988 and 1990 Acts, Congress placed great importance on the ability of communities to reuse closed bases in order to turn the closing of a military base into a boost to the local economy. In introducing the bill that would become the 1988 Act, Representative Armey observed:

There is in my estimation an undocumented concern in many communities that closing the base will result in harm to the community. This has not been true with past base closures. Certainly an economic readjustment is necessary. That is always the case. But in most instances historically where bases have been closed, and the properties have been put to other uses, the communities have gained.

134 Cong. Rec. H1621 (daily ed. April 13, 1988). Representative Armey then cited statistics showing that all but a few communities had experienced a substantial net gain in jobs following base closures, among other benefits. *Id.* Representative Upton likewise stated:

Many people object to base closings because they believe that closing a base would cause an economic depression in the surrounding community. This does not have to be the case. Take,

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closing bases and we may close out my career in the Congress of the United States.' " 134 Cong. Rec. S15557 (daily ed. Oct. 12, 1988). Senator Nunn himself stated: "We see the squeeze on Defense funds. We know we cannot afford excess bases that we do not need. We also understand the reality and the sensitivity in the communities of America that are so dependent in some cases on these bases at least in the short run and we know that that reflects itself here in the Congress." 134 Cong. Rec. S15556 (daily ed. Oct. 12, 1988).

for example, a situation in my own State of Michigan, the closing of Kinchloe Air Force Base in 1977. This base provided 700 jobs and \$36 million in annual local revenues. It closed in 1977, but what has happened since? The answer is an economic boom. The county board of commission established a local economic-development corporation to offer low-interest loans and lease the land at low rates. Nearly 30 companies with more than 1,000 jobs established operations on the former base property, and the expansion is continuing. Closing a military base does not mean harming a community's economy.

134 Cong. Rec. H1616 (daily ed. April 13, 1988). In an article published prior to the passage of the 1988 Act, Representative Armey returned to this theme: "[B]ase closing[s] almost never turn out to be the economic catastrophes that congressmen and their constituents fear. A base closing can be an economic bonanza for a community." Armey, *Base Maneuvers: The Games Congress Plays with the Military Pork Barrel*, 43 Policy Review 70, 75 (Winter 1988).

Congress' concern for the communities' ability to redevelop closed bases led it to establish a closure process that emphasizes speed and finality. This is reflected in the express purpose of the 1990 Act: "The purpose of this part is to provide a fair process that will result in the *timely closure and realignment of military installations* inside the United States." 10 U.S.C. § 2687 (emphasis added). The 1990 Act achieves this purpose by imposing strict time limits on the process by which bases to be closed are selected, eliminating the applicability of statutes that had

previously been used to delay base closures, and establishing a process to select and close obsolete bases in a manner that provides communities with the certainty they need for conversion efforts. By permitting judicial review of the base closure process, the Third Circuit's decisions in *Specter v. Garrett*, 995 F.2d 404 (3rd Cir. 1993) (*Specter II*), and *Specter v. Garrett*, 971 F.2d 936 (3rd Cir. 1992), *vacated and remanded*, No. 92-486 (U.S. Nov. 9, 1992) (*Specter I*) undermine this carefully crafted statutory scheme and will expose communities affected by base closure to economic harm in precisely the manner Congress sought to avoid.

1. As Congress recognized, central to ensuring that affected communities can respond successfully to a base closing is the speed and certainty with which such a decision is made and executed. Judge Alito correctly emphasized in his dissent that "[t]he legislative history makes it abundantly clear that speed and finality were regarded as indispensable components of the new scheme." *Specter I*, 971 F.2d at 958 (Alito, J., dissenting). Representative Armey expressly articulated the importance of speed and finality for the affected communities:

Let me add that one huge advantage to this base closing procedure is that it allows a base closing decision to be made *with some finality*. In the past, proposed base closings were often disputed for year [sic] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base *were greatly harmed by the persistent uncertainty*.

Under this procedure, however, all the communities affected had a chance to thoroughly

make their case for their base. Now, *this time of deliberation will come to an end and the decision will be made*. At this point, communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

I have no doubt that many, if they are hard working and skillful, will do quite well. . . . Often they have ultimately employed more people and offered a larger tax base than the community enjoyed when the military was operating the property. There is hope after base closure.

137 Cong. Rec. H6008 (daily ed. July 30, 1991) (emphasis added).

As this passage clearly shows, Congress intended the base closure process to have finality, to reach a definite end so that the decision could not be "disputed for year [sic] before a final verdict was rendered." The 1988 and 1990 Acts were intended precisely to eliminate roadblocks that previously had permitted "a single Member or even a citizens group [to] stop a base closing simply by tying the matter up in court." 134 Cong. Rec. H1615 (daily ed. April 13, 1988) (statement of Rep. Armey).<sup>3</sup>

Permitting litigation once again to obstruct actual closures would create uncertainty among the business

<sup>3</sup> The House Conference Report for the 1990 Act stated: "[C]losures and realignments take a considerable period of time and involve numerous opportunities for challenges in court. . . . A new process involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3258 (emphasis added).



community and disrupt community efforts to "find the best way to adjust to the base closure." 137 Cong. Rec. at H6008.

The 'what's done is done' attitude is vital to a community's successful readjustment. . . . The Defense Department will announce its desire to close the base, pending the outcome of the environmental studies, and the community leaders immediately devote themselves to preventing it rather than preparing for it. If the base is finally closed anyway, no one will have done the work necessary for an easy transition. . . . [C]ommunity leaders must know from the beginning - *with certainty* - whether or not a closure will occur 12 to 18 months hence. If they have that advance notice and are not encouraged to attempt to avert the closure, the result can be very successful.

Armey, *supra*, at 75 (emphasis added).

2. Congress intended not only that a decision to close a base be final, but also that the decision be executed rapidly. It was the element of speed that led Congress in both the 1988 and 1990 Acts to provide for a specific period of time in which the selected bases were to be closed. Congress was "opening a window for a finite period of time in order that the Secretary may carry out a specific task which is vital to the security and the budgetary health of this Nation. When the task is completed, the window will be closed." 134 Cong. Rec. S4973 (daily ed. April 27, 1988) (statement of Sen. Roth).<sup>4</sup> Without a

<sup>4</sup> The "window" for the 1988 Act will close in 1995, and for the 1990 Act in 1997. Congress contemplated that such a

definite ending point, the Defense Department could unduly extend the process of actually closing a particular base, thus postponing the potential savings Congress had hoped to achieve. *Id.* The window also helps ensure that communities will have access to the base within a specified period of time. Having established a finite period for all selected bases to be closed, Congress could not have intended to permit procedural disputes to tie up closure efforts in court.

Moreover, Congress contemplated that within this window bases would be made available for reuse without undue delays. The 1990 Conference Report stated that "the new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignments." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 707 (1990), reprinted in 1990 U.S.C.C.A.N. 2931, 3259 (emphasis added). Then-Representative Les Aspin reiterated this objective - that the need for speed was important *after* bases had been selected for closure - on the House floor: "[The 1990 Act] streamlined current law on base closures to allow for the expeditious closure of bases *once the decision to close had been fully reached under the process.*" 137 Cong. Rec. H6007 (daily ed. July 30, 1991) (emphasis added).

Indeed, while deliberating on the 1990 Act, individual legislators were experiencing first-hand the problems resulting from delays in implementing closures of bases

window would assist communities in their planning efforts. H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 19 (1988), reprinted in 1988 U.S.C.C.A.N. 3355, 3399.



already selected under the 1988 Act. As exemplified by Representative Vic Fazio's experience, speed in the *execution* of a base closure was just as important as speed in the *selection* of which bases should be closed. In the summer of 1990 Representative Fazio rose in support of a bill that would have eased the delays confronted by communities:

[C]ommunities were promised in the [1988 Act] that they would be able to develop the bases to create civilian jobs and restore civilian investment in the local economy. They were promised that they would be able to achieve these objectives by 1995.

....

With neither a change in the current funding scenario nor clear direction from Congress that cleanups at base closure sites should be given priority, communities will not be able to convert these military installations to the most beneficial use in a timely fashion. Mr. Speaker, this prospect is diametrically opposed to the intent of the [1988 Act] and must be corrected.

136 Cong. Rec. E2173 (daily ed. June 27, 1990) (emphasis added). See also 137 Cong. Rec. H5860 (daily ed. July 30, 1990) ("[a] fundamental tenet of the [1988 Act] was to enable affected communities to convert [installations selected for closure] to civilian use in an expeditious manner.") (statement of Rep. Fazio) (emphasis added).

Concern for speedy execution of base closure decisions led the Senate to adopt a measure in 1991 that, among other things, would have imposed a strict time limit after closure for the Defense Department to convey a military base to the

local community. Amendment No. 1034 to the National Defense Authorization Act for Fiscal Years 1992 and 1993, 137 Cong. Rec. S11778 (daily ed. August 1, 1991) (text of amendment); 137 Cong. Rec. S11941 (daily ed. August 2, 1991) (adoption). The bill's sponsors felt that without a tight deadline, closed bases would "stay there while the economies of these closed base communities die on the vine." 137 Cong. Rec. S11934 (daily ed. August 2, 1991) (statement of Sen. Johnston).<sup>5</sup> Efforts such as these to speed even further the implementation of base closure decisions show the extent of congressional concern that bases be made available quickly to local communities.

3. By suggesting that Congress contemplated that the process of closing bases following their selection could be delayed by litigation, the majority in *Specter I* ignores the plain evidence of legislative intent to the contrary. The majority acknowledged that "Congress clearly intended that the final decision on base closing and realignment be reached with alacrity." 971 F.2d at 946. Moreover, the court declared that "[w]ith a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously

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<sup>5</sup> Though adopted in the Senate, this measure was not adopted by the Conference Committee due to its controversial provisions for transferring closed bases to local communities at no cost. H.R. Rep. No. 311, 102d Cong., 1st Sess. 640 (1991). The Conference Report nevertheless acknowledged the importance of the amendment's underlying concern for timeliness: "The conferees are sympathetic to the economic turbulence encountered by communities that are adjacent to closing military installations. . . . [T]he Senate provision highlights a number of obstacles to timely redevelopment of closing military installations." *Id.* at 640, 641 (emphasis added).

jeopardized if litigation were permitted to divert their attention." *Id.* If the court had stopped there, its analysis could not be questioned. Yet the court went on to find "little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established." *Id.* at 948.

This bifurcation of the closure process between the process of *selecting* bases to be closed and the process of *actually closing* bases finds no support in the legislative history.<sup>6</sup> Congress intended the entire closure process, from selection to actual closure, to operate "with alacrity" so that the Federal Government could realize the economic savings of eliminating obsolete bases as quickly as possible, and so that communities could get on with the business of converting bases to civilian use.<sup>7</sup> A swift selection of bases for closure means little if those bases cannot be closed with some promptness and certainty

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<sup>6</sup> The majority apparently reasoned that because the business of actually closing a military base "is complicated and time-consuming," 971 F.2d at 948, Congress did not harbor any special desire for speed and finality after the selection had been made. As demonstrated above, however, the complicated and time-consuming nature of closing bases was the main catalyst in the passage of the 1988 and 1990 Acts.

<sup>7</sup> Congress' concern for expedition did not preclude providing communities with an opportunity to present their views. The 1991 Defense Base Closure and Realignment Commission (the "1991 Commission") held public hearings during which it received and considered extensive comments from the affected communities, and the local economic impact of the base closure was one of its selection criteria. Defense Base Closure and Realignment Commission, *Report to the President* at 1-2, 4-1, 5-2 through 5-45 (1991) ("1991 Commission Report").

once selected. Indeed, the mere announcement of a desire to close a military base under the pre-existing system could "by itself . . . hurt the local economy." Arney, *supra*, at 72. Congress could not have intended for bases to be selected quickly and publicly, only to have those bases languish in litigation while local communities suffered.

The majority in *Specter I* concluded its analysis with this extraordinary statement: "In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme." 971 F.2d at 948. This analysis shows little appreciation for the difficulties communities face in successfully redeveloping closed bases. Without the speed and finality provided by Congress' statutory scheme, conversion efforts will be stymied. Judicial review, therefore, is fundamentally at odds with Congress' intent.<sup>8</sup> As the majority itself acknowledged, "we know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans." *Id.* It was precisely this sensitivity and concern that led Congress to design a process for base closure that maximized the potential for community redevelopment. Experience confirms Congress' view. Research on how communities have dealt with base closure demonstrates that Congress correctly

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<sup>8</sup> Furthermore, judicial review is ordinarily not "brief." Permitting judicial review will not only delay further a final decision on the Philadelphia Naval Shipyard, it will also impose countless delays on the entire process, calling into question bases selected in 1988, 1991, 1993, and future rounds of base closures.



appreciated the need for certainty and speed in the process of actually closing military bases.

## II. EXPERIENCE SHOWS THAT SPEED AND FINALITY ARE ESSENTIAL FOR COMMUNITIES TO RECOVER SUCCESSFULLY FROM BASE CLOSURES.

The studies conducted to date on how local communities successfully deal with base closures confirm that, with appropriate community planning and direction, "communities can recover and flourish." Keith Cunningham, Business Executives for National Security, *Base Closure and Reuse: 24 Case Studies* 6 (1993) ("BENS Study"). See also Defense Secretary's Commission on Base Realignment and Closure, *Base Realignments and Closures* 25 (1988) ("1988 Commission Report").<sup>9</sup> Experience has taught, however, that certainty and speed in implementing base closure decisions are essential for community redevelopment efforts to succeed. As the 1991 Commission found, "[f]ull economic recovery from base closure is dependent upon *timely disposition* of the facilities and land vacated by the services. The Secretary of Defense should do everything in his power to ensure a *timely*

<sup>9</sup> A comprehensive survey of communities affected by base closures from 1961 to 1990 similarly concluded that "the experience of communities affected by earlier base realignments clearly indicates the communities can successfully adjust to dislocations and base closures." Office of Economic Adjustment, Department of Defense, *Civilian Reuse of Former Military Bases* 2 (1990) ("OEA Study"). The OEA Study documented that communities created 158,104 new jobs to replace the 93,424 civilian military jobs lost when the bases closed. *Id.* at 1.

*transfer* of these valuable assets to the local communities." 1991 Commission Report at 6-1 (emphasis added).

Converting a closed military base to civilian use presents numerous challenges. Communities must find short- and long-term uses for the real estate, buildings, production facilities, housing, equipment, and infrastructure that comprise the closed bases, and must do so in a manner that creates as much employment and income for the community as possible.<sup>10</sup> Base closure studies have shown that to be successful, communities must, among other things: (1) establish a community organization to lead the redevelopment effort and prepare comprehensive redevelopment plans; (2) begin non-military use of a base as soon as possible, often before the military's departure is complete; (3) market the former base to prospective tenants and purchasers; (4) secure the financing required to fund redevelopment efforts; and (5) change applicable zoning, land use, and municipal laws to accommodate the proposed new uses of the former base. See generally BENS Study at 2-3; 1991 Commission Report at 6-1; 1988 Commission Report at 26; President's Economic Adjustment Committee, Department of Defense, *Planning Civilian Reuse of Former Military Bases* 1-28 (1991) ("Reuse Manual"). An overview of these activities is set out in timeline form at page 11 of the attached Appendix; each activity is addressed in greater detail below.

<sup>10</sup> Common uses for closed bases include airports, educational facilities, hospitals, recreational areas, industrial parks, and manufacturing facilities. BENS Study at 7; OEA Study at 1, 3-14.



1. Early organization and planning have proven essential to past redevelopment efforts. Determining how best to reuse a closed base is no easy task.<sup>11</sup> Communities must inventory the existing buildings, facilities, and equipment on the base, and match those assets against potential future uses. Reuse Manual at Supp. 10-12.<sup>12</sup> They must organize themselves and formulate detailed plans to identify public and private entities that might be interested in using the base, improve and expand rail and road access to the base (military bases often restrict access for security reasons), maintain and upgrade the existing utility infrastructure, and make cosmetic changes to give the base a civilian image (e.g., remove military

<sup>11</sup> According to the Economic Adjustment Committee:

*It is important to realize that it is vastly more complex and difficult to adapt an industrial park design or a public use design to a former military base than to develop a master plan for a purpose on raw acreage. The reasons are manifold and relate to the age of the facility, limited-road access, internal utility lines and road patterns which may not relate to new civilian uses, the lack of internal lot and parcel boundaries, and occasionally inadequate engineering plans for the base.*

Reuse Manual at 2 (emphasis in original).

<sup>12</sup> For example, former Air Force bases naturally lend themselves to reuse as civilian airports, but even such a logical transition involves considerable investments of capital, time and effort, as civilian airport standards require substantial upgrades to military facilities. BENS Study at 8. "Conversion of an air base into a civilian airport . . . would use existing infrastructure, have the potential to create a large number of high-quality jobs, and appear on the surface to be a simple and inexpensive option. . . . As many of the communities studied have already discovered, developing an airport is neither cheap nor easy." *Id.*

markings such—as camouflage paint, remove military structures and artifacts). *Id.* at 4-15, Supp. at 4-23. During this organization and planning process, communities must simultaneously negotiate with the federal government to obtain rights to use the facilities.<sup>13</sup>

Once the decision-making process for selecting bases to be closed has been completed, successful communities have been able to take the resources that might otherwise be dedicated to opposing the base closure and use them to organize and generate momentum for the redevelopment effort. BENS Study at 2, 7.<sup>14</sup> For example, the communities surrounding Fort Ord, California, after challenging the base's closure, redirected the organization fighting the closure toward reuse planning. This effort was instrumental in attracting a 25,000-student branch campus of the California State University System. *Id.* at 61. Similarly, the communities surrounding England

<sup>13</sup> After the base selection process has been completed, the Secretary of Defense initiates procedures to dispose of excess real and personal property pursuant to applicable statutes (e.g., Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 484). 1990 Act, 10 U.S.C. § 2287(b). These statutes require that such property be screened for use by federal, state, and local governments, public interests, and private investors, under a prescribed procedure and order of priority. Reuse Manual at 8-9. The Secretary of Defense must consult with state and local governments before disposing of the property. 1990 Act, 10 U.S.C. § 2287(b).

<sup>14</sup> Most communities have reacted to the news that their bases were being considered for closure by immediately organizing themselves to voice their opposition. 1991 Commission Report at 4-1; BENS Study at 1. Thus, organizations and community attention are ready at hand to be directed to redevelopment after base closure decisions become final.

Air Force Base in Alexandria, Louisiana, organized a redevelopment committee to develop a "contingency plan" for base closure before the decision became final, and were able to attract an important tenant to begin operations on the former base before it closed. *Id.* at 38-40.

Time is of the essence in this organization and planning effort.

Time is especially critical for the Defense impacted community. The early recovery steps should be effected prior to the actual base or activity phase-down. The out-migration of talented local residents could otherwise represent a very difficult loss to the long-term recovery and growth of the area.

Reuse Manual at 3.<sup>15</sup> Indeed, the announcement that a base will close can itself undermine the confidence of local businesses and deter future investments unless counteracted swiftly. "When . . . market signals have been interrupted by a major employment or economic loss, economic confidence can be restored through the formulation of a well-conceived development strategy by the local community leadership." *Id.* It is at this time that

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<sup>15</sup> See also 1991 Commission Report at 6-1 ("Successes can result from two things: early creation of an organization to plan and implement a suitable base reuse strategy, and aggressive marketing of base assets and available facilities."); BENS Study at 2 ("[Communities should] [s]tart reuse planning the moment the closure becomes final."); OEA Study at 23 ("In Bangor, planning started as soon as the closing was announced, and because of that . . . the city was able to avoid a sharp economic downturn.").

focusing community efforts on forming a redevelopment strategy is of crucial importance.

The most precious local resources are the time and attention of its local leaders. Without a development strategy, these resources can be readily exhausted by the failure of the community's first ventures during the recovery or adjustment process. It is essential that these first recovery actions be successful and lend themselves to creating *momentum*.

*Id.* (emphasis in original). In the absence of an early and coherent redevelopment strategy, the community will be unable to stem the "outflow" of local businesses and investment.

Thus, the majority's statement in *Specter I* that "the ability of the participants to meet their responsibilities [with respect to the selection process] would be seriously jeopardized if litigation were permitted to divert their attention," 971 F.2d at 946, applies with equal force *after* the decision to close a base has been reached. Litigation diverts the attention of key participants from the organization and planning activities that are so necessary for base redevelopment. Indeed, in Philadelphia, the BENS Study found that "[m]oney and attention devoted to the legal challenge [have] divert[ed] scarce resources from the difficult redevelopment process," so that Philadelphia has yet to complete a plan for base reuse. BENS Study at 7, 63, 87.

2. Finding an interim use for the base as quickly as possible during the military's withdrawal is essential for cushioning the effect of unemployment as the military ceases its operations, defraying the operating costs



involved in maintaining the facilities, and ensuring sufficient occupancy of base buildings to prevent vandalism. Reuse Manual at 15. Military operations commonly phase out in stages during the base closure period. By finding tenants who will lease all or part of the base facilities from the federal government prior to the final closure date, the community simultaneously begins the conversion process and mitigates the immediate economic impact of base phase-out and closure.

[Communities have used] the military phase-down period and the GSA property disposal period to secure *interim use tenants* whose operations are consistent with the long-term base reuse plan. Once the community secures title to the facilities, these tenants can then acquire the facilities outright from the community or provide lease payments to the community management entity. In any event, the cost of maintenance for the facilities is imposed on the tenant/owner.

Reuse Manual at 15 (emphasis in original).<sup>16</sup>

Without the certainty that a base closure decision is in fact final and not subject to reversal or reconsideration,

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<sup>16</sup> For example, England Air Force Base was scheduled for operational closure on December 15, 1992. Twelve companies applied to the local community organization for interim leases, the first of which was granted to J.B. Hunt Transport Inc. The early start allowed J.B. Hunt to establish a driving school on the base and graduate its first class before the facility closed. BENS Study at 38-39. A second example is Fort Devens, a U.S. Army training facility 30 miles north of Boston, Massachusetts (scheduled for closure in June 1996). On April 6, 1993, an inter-modal rail depot operated by Guilford Transportation opened on Fort Devens property. The ground breaking for an approved federal prison is also expected before Fort Devens closes. *Id.* at 32-33.

communities will encounter greater difficulties in obtaining attractive tenants who will commit to even interim leases, much less make longer term commitments. Early tenants often determine the success or failure of a redevelopment effort.

It is important to recognize that the quality and tone of the new base redevelopment will be influenced heavily, if not determined, by the first tenant or prospect for the base. . . . [I]t may be appropriate to pre-select a 'seed tenant' who will fit the optimal market mix for the development.

*Id.* at 7-8 (examples omitted). Neither public nor private entities will be interested in making the necessary investments of time, money, and effort to move onto a base and enter into a formal lease arrangement if the closure decision is being challenged by the very community that is seeking to attract their business.

Under such circumstances, the only tenants who will move on the base will be those interested in temporary arrangements under short-term leases. Short-term tenants are less likely to make the investments in upgrading the infrastructure required for the long term redevelopment of the base. In contrast, interim leases should be granted primarily to tenants who wish to remain on the property over the long term. "Attracting *permanent* tenants for the property, once disposal occurs, is an integral part of a community's strategy for economic recovery." 1991 Commission Report at 6-1 (emphasis added).

The long-term success of the base reuse plan can be determined by how effectively the communities have planned, developed, financed, and



*merchandised the available industrial tracts rather than just how rapidly the community has secured the reuse of the existing few prime industrial buildings on the former base.*

Reuse Manual at 7 (emphasis in original). Failure to attract long-term tenants will necessarily affect the community's ability to generate employment. Indeed, the Reuse Manual counsels communities not to "[fill] the base up" rapidly without obtaining "solid commitments on expected uses or anticipated job levels." *Id.* at 6. Without a firm and final closure decision, prospective tenants will not be willing to give such commitments.

3. While a community is defraying its operating expenses through interim leases, it must obtain financing from public and private sources to fund the redevelopment effort. Primary among the needs for funds is the effort to acquire the facilities themselves from the federal government. Bases closed during the 1960s and 1970s were often transferred to local communities for nominal value. For example, Dow Air Force Base in Bangor, Maine, worth an estimated \$200 million in 1964, was conveyed to the local community for \$1. OEA Study at 16. According to the 1988 Commission, redevelopment efforts prior to the 1988 round were successful in part because of the Defense Department's ability "to turn over to the communities the bases' land, facilities, and equipment. Often these assets were elaborate, substantial, and valuable." 1988 Commission Report at 27. Beginning with the 1988 closures, however, circumstances changed. "[T]he federal government has made a concerted effort to realize proceeds from the disposal of assets. . . . [T]here is a clear expectation that the Department of Defense will

derive financial benefit from the sale of base-closure real estate." *Id.*<sup>17</sup>

Communities must now either purchase the assets directly from the government at fair market value (depending on the intended use), or wait for the government to sell the assets directly to private parties through competitive bidding. Reuse Manual at 9-10. While the latter is less costly for a community, it also means that "the community does not have any influence in the selection of the ultimate use or owner." *Id.* at 10. According to the 1988 Commission, "[c]ommunities would often prefer that properties be conveyed expeditiously so that economic recovery can get off to a quick start, and the government's waiting for reasonable bids may frustrate that goal." 1988 Commission Report at 27. The Reuse Manual advises communities to purchase some base property outright, even though it could be obtained at lower cost if limited to a public purpose, because such lower cost conveyances contain use restrictions that would drive off certain private investors.

Most banks and other long-term credit institutions will not finance construction or improvements on a leasehold with any type of deed restrictions. As a result, many industrial and commercial firms will insist on having clear fee-simple title to the facilities and land on which they plan to make extensive investments.

Reuse Manual at 10.

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<sup>17</sup> As described in note 5 *supra*, Congress considered, but did not adopt, a provision that would have provided for no-cost transfers of base assets to local communities.

In addition, communities will need to obtain financing to maintain, improve, and change the base facilities for the planned new uses. The bases available to communities for reuse are often not in optimal condition.<sup>18</sup> Substantial investment may be required to bring even well-maintained facilities to civilian standards.<sup>19</sup> Finally, the public or private entities that will be using the base will have to make investments of their own to modify the facilities to accommodate their specific needs.

Certainty that a base will close, is, of course, essential for the commitment of funds to any proposed project. Without such certainty, and without some assurance that litigation will not unduly delay closure activities, communities may not be able to secure necessary financing.

Timing is a particularly precious commodity for private investors. When a community has assembled a package that includes private investment, success often depends on getting

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<sup>18</sup> The condition of the bases was an explicit consideration in determining whether the base should be closed. See 1988 Commission Report at 14 ("In their visits to military installations, the Commissioners were struck by the number of deteriorating facilities."); 1991 Commission Report at C-1.

<sup>19</sup> For example, converting a military airfield to civilian use often requires substantial work. See note 16 *supra*. The San Bernardino International Airport Authority in California has already spent \$11 million dollars of public grants and private loans planning for the July 1994 closure of Norton Air Force Base. Tom Gorman, *A Bolt from the Blue*, Los Angeles Times, Sept. 26, 1993, at 3. And Kansas City must secure millions of dollars of financing to bring Richards-Gebaur Air Reserve Station up to civilian airport standards, as well as to cover the \$13 million annual operating budget. BENS Study at 68.

real-estate matters settled so that redevelopment can proceed.

1988 Commission Report at 27. If, as the Reuse Manual points out, "banks and other long-term credit institutions will not finance construction or other improvements on a leasehold with any type of deed restrictions," Reuse Manual at 10, they would be even less likely to provide financing when the closing of the base is itself in doubt.

The private sector is already reluctant to invest in defense conversion efforts, as found by BENS in an analogous study of defense conversion issues. Erik R. Pages, Business Executives for National Security, *Next Steps in Business Conversion: Supporting Innovation and Entrepreneurship* 7 (1993) (documenting the difficulties that conversion efforts have in securing private sector financing). Reducing the degree of certainty of closure would make securing significant private sector financing even more difficult, if not impossible. Without private financing, communities would have to raise local taxes or increase deficit spending in order to make necessary expenditures to maintain and improve base facilities. The limited amounts of federal assistance available to affected communities would not be able to cover the loss of private investment.<sup>20</sup>

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<sup>20</sup> "Within the last decade there has been a diminution of federal money available to assist affected communities." 1988 Commission Report at 28. According to the 1988 Commission, the Economic Development Administration had only a fraction of its previous funding to assist the communities affected by the closure of 86 bases in the 1988 round. *Id.*



4. Once the decision to close a base becomes final, affected communities typically form an organization to market the base to potential tenants and purchasers. Crucial to successful redevelopment is "aggressive marketing of base assets and available facilities." 1991 Commission Report at 6-1. Such marketing efforts must get underway immediately if the community is to obtain the necessary commitments from potential end users of the base.

Marketing requires communities to invest time and money not only to develop pamphlets, brochures and other marketing materials for delivery to appropriately targeted audiences, but also to make actual improvements to the base to make it attractive to potential users. The 1988 Commission reported that

[Successful communities] assembled dedicated teams that not only drafted ambitious plans, but also made their cases effectively to public agencies and private companies, often travelling extensively to do so. The best of the organizers were relentless. The communities went to great lengths to make themselves and the former bases attractive to investors and business. Roads were built; sewer pipe was laid; and services were improved.

1988 Commission Report at 26.

In recent redevelopment efforts, similar investments have been made to market bases to potential investors. To market the Presidio of San Francisco, the Department of the Interior has developed a 150-page, highly professional marketing booklet to help it attract tenants to the base, which is scheduled for closure in April of 1995. In Mesa, Arizona, the community redevelopment organization's early and aggressive marketing of Williams Air

Force Base was instrumental in the community's successful efforts to obtain commitments from three private sector tenants, who will move onto the base immediately following the Air Force's departure. BENS Study, Resource Annex at 105-112.

Like the other activities necessary for base reuse, marketing efforts depend on the base closure decision having finality. Without a firm commitment on a closure date, potential tenants may move to other locations. For example, Chase Field Naval Air Station in Beeville, Texas, lost commitments from several potential tenants because it was unable to verify interim lease dates from the Navy. BENS Study at 30. Judicial review would frustrate marketing efforts by calling base closure dates into question.

5. In addition to focusing outward to attract investment, communities must focus inward to resolve jurisdictional disputes and make appropriate changes in zoning and land use laws. A closed base rarely falls within the boundaries of a single municipality, and even if it does, potential disputes among local, county, and state governments must be resolved. "Unless communities start working together immediately, these ambiguities can lead to damaging turf battles among the interested governments. Such disputes delay planning and can cause problems in applying for federal aid." BENS Study at 10.<sup>21</sup> Of the 24 bases studied by BENS, 15 succeeded in moving quickly

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<sup>21</sup> For example, Lowry Air Force Base in Colorado fell between the Colorado cities of Denver and Aurora. Initially the cities disagreed on reuse plans, but they were able to come to a compromise on zoning rights before operational closure, scheduled for September 1994. BENS Study, Resource Annex at 49.



to reach regional and state consensus on how to use the closed bases. *Id.* Settling such jurisdictional disputes requires the time and attention of community leaders; time and attention which would be otherwise occupied by litigation challenging the base closure decision.

Community leaders must also make necessary zoning changes to accommodate the different uses selected for the base.

While zoning requirements usually are not applied to active military installations, the transfer of ownership from the military to civilian uses will require appropriate zoning designations as determined by the local community. Zoning, in fact, is the primary tool available to communities to control the type, density and location of development at a former military site.

Reuse Manual at Supp. 12. Given the important role zoning plays in redevelopment, communities must begin taking the necessary legislative and regulatory steps to put in place a zoning scheme by the time the base is open for community reuse. Judicial review of base closure decisions can only delay such efforts, since changes to applicable laws must await the ultimate outcome of any pending legal challenges.

## CONCLUSION

Actual experience confirms what Congress anticipated in crafting the 1990 Act, that speed and finality are crucial for communities to successfully convert military bases to civilian use. Every stage of the redevelopment process hinges on bases being closed without the delays and uncertainties that accompany litigation. Judicial review is therefore fundamentally inconsistent with Congress' intent – manifest in the text and legislative history of the 1990 Act – to close military bases in a manner that maximizes the potential for communities to succeed in redevelopment efforts.

For the foregoing reasons, and for the reasons set forth by petitioners in their Brief, the judgment of the U.S. Court of Appeals for the Third Circuit should be reversed.

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## APPENDIX



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Managing Partner & Chief Executive  
Arthur Andersen & Co., S.C.  
New York, NY

Stanley A. Weiss  
Chairman  
American Premier, Inc.  
King of Prussia, PA

The Hon. John C. Whitehead  
Chairman, AEA Investors, Inc.;  
Former Deputy Secretary of State  
New York, NY

Malcolm H. Weiner  
Chairman  
The Milburn Corporation  
New York, NY

Josh S. Weston  
Chairman & CEO  
Automatic Data Processing, Inc.  
Roseland, NJ

James D. Wolfensohn  
Chairman  
The John F. Kennedy Center  
for the Performing Arts  
Washington, D.C.

\*Partial list of members April 1993. Corporate affiliations  
for identification purposes only.



# Base Closure Time-Line

